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November 17, 2006

Mr. Steven A. Wuthrich  
1011 Washington Street, Suite 101  
Montpelier, ID 83254

Re: Objections to Decision, Request for Agency Action, Notice of Appeal of  
Application Denial and Request for Relief

Dear Mr. Wuthrich:

Your letter of November 10, 2006 has been referred to me for response. You ask that the Division take action to revoke the mining permit of Thomas American Stone (Thomas), and process the application of Wright/Garff Resources L.L.C. In addition, you have asked "to appeal the adverse determinations [the Division has] made to the contrary and request an informal hearing, or formal hearing as applicable." First, I will attempt to clarify the Division's October 30<sup>th</sup> letter which set forth the reasons the Division believes it is not in a position to revoke the Thomas permit and to process the Wright/Garff application at this time. Secondly, I will explain your options for seeking a review of the Division's decision.

The disagreement is centered on our different views concerning the rights of each party to use the land that is included in both the Thomas Permit and the Wright Garff application for a permit. Judge Brian's Order does make it clear that Wright/Garff owns a "86.761111% interest in and to the building stone and other minerals in and under Lot 38, together with the right of ingress, egress and reasonable surface use to prospect for, mine and remove the same, including without limitation the right to utilize surface or [sic] open pit and/or quarrying methods". The Court also found that the surface rights in the lands are owned by American Stone and "include the surface soil and other mineral lying on the immediate natural surface of the land, vegetation growing on the surface and the right to construct structures on the surface and to use the surface for surface uses, such as farming, ranching, residential, residential commercial, industrial and recreational

purposes, together with the right to penetrate the surface incidentally to the exercise of surface rights (e.g., for foundations, footings, basements, water lines or sewer lines).” Accordingly both parties have limited rights to use the property in question.

‘Mining activities’ that require a permit from the Division are “activities conducted on the surface of the land for . . . development of, or extractions of a mineral deposit, including but not limited to, surface mining, and the surface effects of underground and in situ mining, on-site transportation, concentrating, milling, evaporation, and other primary processing.” See Utah Code §40 –8-4(14). The existing Thomas permit includes the area of disputed rights. The permit authorizes both the removal of building stone and surface activities such as splitting, cutting, stacking and storage prior to shipping. Although the determination by the court that Mr. Thomas does not have a right to the mineral estate *does* eliminate the right of Mr. Thomas to extract building stone from this land, the court order acknowledges his right to use of the surface area for other activities including industrial uses provided they do not interfere with the rights of Wright/Garff to remove the building stone. The current status of Mr. Thomas’ operations is that he is removing building stone from other land within the permit area and from other permitted lands and splitting, sorting, stacking and storing the stone on the surface of the area of disputed use. Except for the intentions of Wright/Garff to mine these lands there is no doubt that the surface operations would be permissible both as a proper use of the surface estate and a use authorized by the Division’s permit and subject to the surety and obligations to reclaim.

The mining application of Wright/Garff shows an intention to operate in the area of the open pit and the pit face. Such operations by Thomas that are in that area will need to stop, and yet the entire surface estate does not appear to be needed or proposed for use by the Wright/Garff application. The extent of the surface area necessary for Wright/Garff’s proposed operations and the extent of the surface that may be left for Thomas’ use is not within the Division’s regulatory authority, and must be either resolved by the parties or by a court. In addition, the law is well established<sup>1</sup> that the developer of the mineral estate must make reasonable accommodation for the surface uses including paying reasonable compensation for loss of crops, or damage to improvements. Given the transitory aspects of Thomas’ surface use and improvements, it is not likely that the amount due as damages is very large, but this is also an area that is outside of the authority of the Division to decide.

Since Wright/Garff’s rights to the mineral estate are still subject to a resolution of these two issues: the extent of the surface area remaining available for Thomas’s use, and the damages due to Thomas for removal or relocation of improvements; it is not possible for the Division to process the permit application. The suit to quiet title, that was resolved prior to the application for a permit to mine, did not directly address these questions. The language of the Order is not specific enough to resolve them. A resolution could be very

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<sup>1</sup> The nature of the surface protections required are dependent to some extent on the statute from which the mineral and surface estates are derived. See e.g. The Stockraising Homestead Act, 43 USC §291, or the Open Pit Mining Act of 1949, 30 USC §54.

simple if the parties were able to cooperate on a plan, but apparently such a solution is not likely, and so the permit fee has been returned to you.

The judicial resolution of these disputed issues is not insurmountable and so it is reasonable to assume that the Thomas permit will need to be modified and that the Wright/Garff permit may be issued. Thomas's continuing operations should anticipate and allow for this eventuality. Assuming Wright/Garff continues to pursue a permit, when the conditions for shared use of the surface are resolved, Thomas will be required to either modify its permit pursuant to R647-4-102 and Utah Code §40-8-18 (2006), or the parties may agree to a partial transfer of the permit. The preservation of the open pit face for the future extraction of building stone could be directly compromised by the current obligation of Thomas to reclaim the high wall. In the interests of preserving future options, Thomas will be directed to not undertake any reclamation activity that will fill-in the pit face to allow a reasonable time for the relative surface use rights to be determined.

Appeal of this Decision is allowed under the Utah Administrative Code provisions governing large mine operations, at R647-4-1 et seq. and the administrative provisions at R647-5-1 et seq.(2006). The Division has determined that it cannot process the permit for the reason that the application does not contain the information required by the Division to process it. This decision may be appealed at an informal hearing before the Division Director pursuant to the provisions of R64-5-104 and R64-5-106 of the Utah Administrative Code. If necessary, decisions at an informal hearing may be appealed to the Board as provided in R647-5-106(17) (2006).

If it is your desire to appeal the Division's decision not to process the Notice of Intention you must send a written request for agency action to the Division that complies with the requirements of R64-5-104 (2.13) within thirty, (30) days of the receipt of this letter. Your request must include the names and addresses of all persons given notice of the appeal, a certificate of mailing of the request to such persons, a statement of the legal authority and facts and reasons forming the basis for your request. You are required to send a copy to Thomas American Stone and any other party known to have a direct interest in the requested agency action. Upon receipt of such a request the Division will set a time and place for a hearing before the Division Director and give notice of the hearing. The hearing will be open to all parties, and will be conducted informally in accordance with Utah Administrative Code R647-5-106 (2006).

Please feel free to call to discuss any questions that you may have regarding this letter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Steven F. Alder", written in a cursive style.

Steven F. Alder

Attorney for Division of Oil, Gas & Mining

Cc: Mary Ann Wright